S.T.A.R., Inc., Lighting The Way . . . *and* New England Health Care Employees Union, District 1199, SEIU. Case 34–RC–2111

May 25, 2006

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held March 23, 2005, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 74 ballots for and 47 ballots against the Petitioner, with 4 nondeterminative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, adopts the hearing officer's findings[1] and recommendations only to the extent consistent with this Decision and Direction, and finds that the election must be set aside and a new election held.

We find that the hearing officer erred in overruling the Employer's Objection 3, which alleged that the Petitioner tainted the election by communicating to employees that it would waive initiation fees for only those employees who actively supported the Union. We sustain Objection 3 and set aside the election.

I. FACTS

During the critical period, Union Agent Ariel Lambe gave a brochure to employee Michael Gallo. In relevant part, the last page of the brochure provides:

> There is a one-time $50 initiation fee. *Workers who organize to join 1199 are exempt*, and begin paying dues once a contract is won. [Emphasis added.]

The last page of the Petitioner's brochure also sets forth formulas for calculating union dues and includes a breakdown of how the Petitioner spends its dues revenue.

After receiving the brochure, Gallo commented to employee Daniela Kurtz: "[C]an you believe these guys get to organize the Union and then they don't have to pay the initiation fee and other people will." On his own initiative, Gallo gave the brochure to Supervisor Linda Snell, who, in turn, gave it to the Employer's executive director, Katie Banzhaf. Banzhaf photocopied the last page of the brochure and placed a photocopy in each employee's mailbox approximately 2 to 3 weeks before the election.

At some point before Lambe had given the brochure to Gallo, the Petitioner described its fee-waiver policy at an organizing meeting in Bridgeport, Connecticut.[2] Approximately 18 of the 136 unit employees attended this meeting. Union Agent David Pickus explained to the few employees in attendance that "there is no initiation fee for anyone working at the facility before [the Petitioner] obtains a contract." He also told them that only employees hired by the Employer after the Petitioner won a contract would pay the initiation fee. Pickus distributed a copy of the Petitioner's bylaws to the employees who attended the Bridgeport meeting. In relevant part, the bylaws provide that "[i]n the case of new organization, those employees hired before the signing of an initial collective bargaining agreement shall not be required to pay an initiation fee."

Apart from the Bridgeport meeting, the Petitioner distributed its bylaws to each employee who met with union organizers. However, the record does not disclose how many employees met with union organizers.

On an unspecified date during the critical period, Union Agent Pickus informed employee Gallo by telephone that "you don't pay any dues until we get a contract, there is no initiation fee, that's the policy of the Union, as stated in the Union's bylaws."

II. ANALYSIS

A union interferes with free choice when it offers to waive initiation fees for only those employees who manifest support for the union before an election. See *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). When a union makes an ambiguous offer to waive fees, it is the union's "duty to clarify that ambiguity or suffer whatever consequences might attach to employees' possible interpretations of the ambiguity." *Inland Shoe Mfg. Co.*, 211 NLRB 724, 725 (1974); cf. *Davlan Engineering*, 283 NLRB 803, 805 (1987) (a union may avoid responsibility for the improper fee-waiver statements of its solicitors by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards). Absent an adequate clarification, the

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] The record does not establish the precise date on which the Bridgeport meeting occurred. However, the hearing officer found that it predated the occasion when Union Agent Lambe gave the brochure to employee Michael Gallo.

Board will set aside an election based on an ambiguous offer to waive fees if the offer is reasonably susceptible to an interpretation that violates the principles of *Savair*. *Rounsaville of Tampa, Inc.*, 224 NLRB 455, 455 (1976), supplemented by 227 NLRB 1079 (1977); *Inland Shoe Mfg. Co.*, 211 NLRB at 725; *Deming Division, Crane Co.*, 225 NLRB 657, 659 (1976).

As the hearing officer found, the Petitioner's brochure is ambiguous and reasonably susceptible to an interpretation that violates the principles of *Savair*. The brochure states that "[w]orkers who organize to join 1199" are exempt from the initiation fee, thereby communicating the message that workers who do not "organize to join 1199" are not exempt. The brochure does not make it clear that those employees who sit silent or advocate against unionization during the campaign would also be exempt. Because the ambiguous brochure is reasonably susceptible to an interpretation that violates the principles of *Savair*, absent adequate clarification, the Petitioner has interfered with employee free choice.[3]

We disagree with the hearing officer's finding that the Petitioner adequately clarified its fee-waiver policy. In determining whether the Petitioner's clarifications were adequate, we must first consider how many employees were affected by the Petitioner's objectionable conduct. All 136 employees who were eligible to vote in the election received a photocopy of the Petitioner's ambiguous, coercive brochure. The Petitioner gave the brochure to employee Gallo, thereby interfering with his free choice. Gallo then voluntarily gave the brochure to the Employer. Later, approximately 2 to 3 weeks before the election, the Employer placed photocopies of the last page of the brochure in the mailboxes of all 136 employees. Where, as here, employees receive in their mailboxes a special page governing the payment of union fees, and this occurs during the heat of a union organizational campaign, we think it reasonable to infer that employees will not ignore the message.

The Petitioner did not clearly articulate a nonobjectionable fee-waiver policy to these 136 employees. Approximately 18 employees—far less than the number in the proposed unit—attended the Bridgeport meeting where Pickus articulated a nonobjectionable fee-waiver policy and distributed bylaws describing its policy.[4] One additional employee, Gallo, heard Pickus articulate a nonobjectionable fee-waiver policy over the telephone. The record does not establish that any other employees learned that the Petitioner would, contrary to a reasonable reading of the brochure, waive the initiation fees for all employees hired before a first contract is reached. Though organizers distributed a copy of the Petitioner's bylaws to every employee with whom they met, the record does not establish how many employees, if any, met with union organizers other than the 19 employees discussed above. The Board does not presume dissemination of a union's clarifications of an ambiguous offer to waive fees.[5] Thus, the coercive brochure was "cor-

[3] The dissent alleges that our decision today is in tension with *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004). We disagree. In *Lutheran Heritage*, the Board set forth a framework for analyzing employers' handbook rules under Sec. 8(a)(1). In relevant part, *Lutheran Heritage* explains that an employer's rule is unlawful if "employees would *reasonably* construe the language [of the rule] to prohibit Section 7 activity." Id., slip op. at 1–2 (emphasis added). When determining a rule's reasonable constructions, the Board must refrain from reading particular phrases in isolation and must not presume improper interference with employee rights. Applying these principles, the *Lutheran Heritage* majority found that employees could not reasonably interpret the employer's rules against harassment and abusive or profane language as prohibiting Sec. 7 activity. Id., slip op. at 3 ("[R]easonable employees would infer that the Respondent's purpose in promulgating the challenged rules was to ensure a 'civil and decent' workplace, not to restrict Section 7 activity."). Hence, the Board found that those rules were lawful.

Applying these principles here, we find that employees could reasonably interpret the Petitioner's brochure as requiring an employee to actively organize on the Petitioner's behalf to be eligible for a fee waiver. In reaching this conclusion, we refrain from reading in isolation particular phrases of the brochure's last page and we do not presume improper interference with employee rights. Consistent with *Lutheran Heritage*, we find the Petitioner's fee-waiver statement, contained in its brochure, to be objectionable. The rule here explicitly deals with Sec. 7 rights, viz., the right to refrain from paying moneys to a union. For that reason, extant Board law, cited above and not overruled in *Lutheran Heritage*, requires that any ambiguities be clarified.

In Member Schaumber's view, the dissent's focus on the absence of evidence of subjective employee beliefs is a red herring. The Employer cannot reasonably be faulted for failing to adduce evidence on an issue, the subjective beliefs of employees, which is considered irrelevant under extant Board precedent.

The hearing officer overruled Objection 3 in part because she found that the Petitioner did not "utilize the ambiguous initiation fee waiver policy in its brochure as a campaign tool." Absent adequate clarification, the Petitioner interfered with employee free choice by distributing the ambiguous brochure to Gallo regardless of whether it engaged in additional efforts to capitalize on the brochure.

[4] Our dissenting colleague accuses us of rejecting the rule that a union may avoid responsibility for improper fee-waiver statements "by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards." See *Hollingsworth Management Service*, 342 NLRB No. 50, slip op. at 4 (2004). We do not reject that rule. We apply it. The Petitioner showed that it articulated a nonobjectionable fee-waiver policy and gave its bylaws, which contained such a policy, to a total of 19 employees. This effort was not reasonably calculated to reach the 136 unit employees affected by the Petitioner's objectionable conduct.

[5] In *University Towers*, 285 NLRB 199 (1987), employee solicitors made coercive statements about fee waivers. A union agent "clarified" the union's policy by telling employees at a union meeting that the "original group" would not have to pay a fee, and that "original group" referred to "[employees] that organized the unit, that are employed at the time the unit is organized." The Board found that the clarification was insufficient to "neutralize" the coercive fee-waiver statements for two reasons. First, the clarification was confusing. Second, and "in

rected" for only about 19 employees.[6] Consequently, the brochure was the sole source of information about initiation fees for as many as 117 employees.[7]

Contrary to the hearing officer, we will not preclude the Employer from relying on its own dissemination of the brochure to show that the Petitioner's objectionable conduct affected all 136 unit employees. See *Sears Roebuck de Puerto Rico*, 284 NLRB 258 (1987). In *Sears Roebuck de Puerto Rico*, a supervisor uttered a plant-closure threat to approximately five employees. The union learned of the supervisor's threat, and it disseminated news of the threat in a leaflet that it distributed to numerous employees. Before the election, the employer learned that the union had disseminated news of the supervisor's threat. Nevertheless, the employer did not disclaim the supervisor's threat. The union lost the election and filed objections. The Board set aside the election, relying on the union's dissemination of the employer's threat to conclude that the threat could have affected the election result. Id. at 259 fn. 13 and 272. Thus, the Board has permitted an objecting party to rely on its own dissemination of a prevailing party's objectionable conduct. We do so here.[8]

Our dissenting colleague attempts to distinguish *Sears Roebuck de Puerto Rico*, supra, on the ground that the prevailing party in that case knew of the objecting party's dissemination and failed to inform voters that it disavowed the threat. She contends that the Petitioner was not aware that the Employer had disseminated its coercive brochure. She argues that it is "unfair" to "punish" a prevailing party (by setting aside an election) when that party had no reason to know that its coercive statement reached a determinative number of voters through the objecting party's dissemination. She argues that the election should stand, even though many voters read a coercive statement, because the Petitioner did not have an opportunity to disclaim it.

We are not persuaded by our colleague's attempt to distinguish *Sears Roebuck de Puerto Rico*. The Board in that case did not state or imply that the result depended on whether the party who engaged in the objectionable conduct knew of the dissemination of that conduct. Nor should the result depend on such knowledge. The issue in these cases is not whether a party should be "punished." Rather, the inquiry is whether the employees have been exposed to conduct that interfered with their free choice. Thus, the critical facts in this case are that the Petitioner's brochure contained an objectionable statement, that the statement was distributed to 136 employees, and that the Petitioner did not, as required by Board precedent, clarify its policy for most of these employees. The fact that the Petitioner was unaware of the distribution, and so arguably saw no need to clarify its policy, is beside the point. The point is that the Peti-

any event," only a limited number of unit employees heard the clarification. In other words, the Board refused to presume dissemination of the union's clarifications. See also *Inland Shoe Mfg. Co.*, 211 NLRB at 725 (finding a union agent's clarification to be inadequate because it was not sufficiently clear and, "[i]n any event," because "it is by no means clear that all employees who received the pamphlet attended this meeting"). Our dissenting colleague asserts that *University Towers* and *Inland Shoe* are "easily distinguishable." However, her claimed distinction is not relevant to the issue involved herein—whether the Board presumes that clarifications are disseminated. Consistent with these cases, we decline to presume that the Petitioner's clarifications were disseminated. Cf. *Erie Brush & Mfg. Corp*., 340 NLRB 1386, 1386 (2003), enfd. 406 F.3d 795 (7th Cir. 2005). In light of *Erie Brush*'s holding that the Board will not presume dissemination of objectionable fee-waiver statements, it seems particularly appropriate to refuse to presume dissemination of clarifications of objectionable fee-waiver statements.

[6] The dissent argues that the Petitioner failed to issue a broader clarification because it was unaware that the Employer had widely disseminated the objectionable brochure. The Petitioner's ignorance on this point is irrelevant to our analysis.

[7] The dissent alleges that our decision today cannot be reconciled with *Delta Brands, Inc.*, 344 NLRB No. 10 (2005). We disagree. In *Delta Brands*, the Board overruled a union's election objection because the union failed to prove that the employer's rule against unauthorized solicitations could have affected the election result. During the critical period, the rule was disseminated to only one voter, and that vote was nondeterminative. The rule was buried in a 36-page handbook. It was not promulgated in response to union activity. Additionally, the record lacked evidence that the employer had enforced the rule or that the rule had in fact deterred any employees from engaging in Sec. 7 activity. Under those particular circumstances, the Board found that the union failed to satisfy its burden of proving that the employer's rule could have affected the election result. Importantly, the Board did not hold that objecting parties in all cases must prove that an objectionably overbroad rule was enforced or that it actually deterred employees from engaging in Sec. 7 activity.

The facts of this case are significantly different from those in *Delta Brands*, and we reach an appropriately different result. During the critical period, all 136 eligible voters received a photocopy of the brochure's last page. The photocopy was a single page, not a lengthy document. Under these different circumstances, we find that the Petitioner's objectionable fee-waiver statement could have affected the election result. We make this finding without requiring any evidence of enforcement or that employees were actually deterred from engaging in Sec. 7 activity. *Delta Brands* does not require otherwise.

The dissent also argues that we have improperly presumed: (1) that employees in fact believed that the Petitioner had an objectionable policy; and (2) that employees therefore voted in favor of the Petitioner. These facts are irrelevant, and we have not presumed them. The Board applies an objective standard when evaluating statements that allegedly interfered with employee free choice. *Cedars-Sinai Medical Center*, 342 NLRB No. 58, slip op. at 2 (2004). The relevant inquiry is whether employees would reasonably construe the rule as saying that they must support the Union now in order to obtain the fee waiver.

[8] See also *Delta Brands, Inc.*, 344 NLRB No. 10, slip op. at 2 fn. 6. In that case, the Board found that the objecting union could have relied on its own dissemination of the employer's overbroad no-solicitation policy (had it occurred) to prove that the employer's overbroad policy could have affected the election result.

tioner's ambiguous fee-waiver statement reasonably tended to coerce a determinative number of employees in their election choice. Consequently, and to avoid sanctioning a tainted election result, we take into consideration the fact that all of the employees were exposed to the objectionable statement.

Our dissenting colleague also argues that a special reason exists in this case for precluding the Employer from relying on its dissemination of the Petitioner's coercive brochure. She claims that the Employer strategically disseminated the Petitioner's coercive brochure to provide a basis for an election objection in the event that the Petitioner won the election. She argues that strategic dissemination of another party's coercive statements is itself "misconduct," and notes that parties are generally estopped from relying on their own misconduct in support of an election objection.[9] Conceding that no direct evidence supports a factual finding that the Employer's dissemination was strategic, she infers this fact. However, she does not cite the record evidence from which she draws this inference. She does imply that it is reasonable to draw this inference from the fact that the Board set aside an earlier election because the Employer had interfered with employee free choice by granting a bonus to employees.[10] We find it unreasonable to draw such an inference on this record, even considering the Board's earlier decision. The brochure's final page contained important information about dues and fees relevant to the campaign. In particular, it set forth formulas for calculating union dues. An employer attempting to lawfully persuade its employees to vote against representation might well point out representation's financial costs. Absent relevant record evidence, we decline to infer that the Employer's dissemination of the brochure was calculated to provide the Employer with a basis to set aside the election.

We find that the Petitioner failed to adequately clarify the ambiguous, coercive fee-waiver statement in its brochure. Consequently, we sustain Objection 3, set aside the election, and direct a second election.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by New England Health Care Employees Union, District 1199, SEIU.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. May 25, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Setting aside the election here is inequitable, and our decisions do not compel—or countenance—that result. As I will explain, the Union cannot fairly be faulted,

[9] In Member Schaumber's view, there is a meaningful distinction between publicizing another party's misconduct and seeking to capitalize on one's own.

[10] See *Star, Inc.*, 337 NLRB 962 (2002).

given its clearly demonstrated intention to comply with the law, coupled with the Employer's own crucial role in arguably interfering with employee free choice.

I.

The Union won the election by a margin of 27 votes. Its only objectionable conduct was giving *one* employee, Michael Gallo, an ambiguously-worded brochure that arguably ran afoul of the *Savair* rule with respect to the waiver of initiation fees.[1] The Union's actual fee-waiver policy was entirely lawful. And all of the Union's other communications on the subject were proper. It accurately described its lawful fee-waiver policy at an organizing meeting, and it gave every employee there a copy of its bylaws, reflecting the policy. In turn, every employee who met with union organizers was given the bylaws. Finally, the Union gave employee Gallo—who received the ambiguous brochure—an accurate oral explanation of its fee-waiver policy, which referred to the bylaws: "[Y]ou don't pay any dues until we get a contract, there is no initiation fee, that's the policy of the Union, as stated in the Union's bylaws."

The twist in this case is that the ambiguous last page of the brochure was ultimately disseminated to all 136 employees eligible to vote—by the *Employer*, who received the brochure from employee Gallo. On that basis, the majority concludes that the Union interfered with employee free choice and that this conduct may have affected the outcome of the election. Contrary to the hearing officer, the majority expressly permits the Employer to rely on its own dissemination of the brochure. And it rejects application of the rule that a union may avoid responsibility for improper fee-waiver statements "by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards." *Hollingsworth Management Service*, 342 NLRB No. 50, slip op. at 4 (2004), quoting *Davlan Engineering*, 283 NLRB 803, 804 (1987).

II.

The facts here demonstrate that the Union *did* clearly publicize its lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they signed cards. It apparently explained that policy to every employee with whom it had direct contact—including Gallo, the only employee who received the ambiguous brochure from the Union—by, among other things, distributing a copy of its bylaws.[2]

The majority observes that, given the state of the record, it is possible that the ambiguous brochure "was the sole source of information about initiation fees for as many as 117 employees." But this is only because *the Employer* distributed the brochure page to all of its employees. And there is nothing in the record that demonstrates that the Union was aware of what the Employer had done, presumably for its own advantage (not the Union's). Without such knowledge, of course, there was no reason for the Union to seek to cure the ambiguous statement in the brochure by reiterating its lawful fee-waiver policy to all employees. As far as the Union knew, only employee Gallo had received the brochure—and he had also been given an accurate statement of the Union's policy.

The record does not contain direct evidence that the Employer disseminated the Union's brochure to create a basis for setting aside the election, should it lose. But that is surely a reasonable inference, and it weighs against setting the election aside. Cf. *B. J. Titan Service Co.*, 296 NLRB 668, 668 fn. 2 (1989) (citing "well-established principles that a 'party to an election is ordinarily estopped from profiting from its own misconduct'"). Notably, the Employer—through the same manager involved here—has previously engaged in objectionable election conduct of its own. See *Star, Inc.*, 337 NLRB 962 (2002) (setting aside election, based on employer's payment of preelection bonus to employees).[3]

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[1] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). I assume for the sake of argument that the brochure's statement violated the *Savair* rule, because, as the majority finds, the statement is "reasonably susceptible to an interpretation that violates the principles of *Savair*."

The Board's approach to such statements, however, seems in tension with *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), and its progeny. There, over a dissent from Member Walsh and myself, the Board adopted a new, more restrictive approach to facial challenges to the legality of *employer* rules. The *Lutheran Heritage* Board observed that the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." Slip op. at 2.

Here, it would seem at least as reasonable to interpret the Union's statement ("[w]orkers who organize to join 1199 are exempt" from the initiation fee) as a proper, if inartful, summary of the Union's *lawful* waiver policy, reflected in its bylaws: that "[i]n the case of new organization, those employees hired before the signing of an initial collective bargaining agreement shall not be required to pay an initiation fee."

[2] Two cases relied upon by the majority are easily distinguishable.

In *University Towers*, 285 NLRB 199 (1987), the Board relied heavily on the fact that there was "no evidence that the Petitioner distributed any written materials explaining its fee-waiver policy to employees." Id. at 200. Here, of course, the Union did so.

In *Inland Shoe Mfg. Co.*, 211 NLRB 724 (1974), the Board found: (1) that the union's constitution and bylaws failed to establish a clearly lawful fee-waiver policy; and (2) that the constitution and bylaws provisions were never communicated to employees. In this case, the Union's bylaws did establish a lawful policy, which was provided to every employee with whom the Union had direct contact.

[3] The majority cites *Sears Roebuck de Puerto Rico*, 284 NLRB 258 (1987), as support for relying on the Employer's dissemination of the brochure in setting the election aside. But *Sears Roebuck* is distinguishable. There, the employer's agent told employees that if the union won,

Despite the majority's assertion that "many voters read a coercive statement," there is no evidence that any employee (other than Gallo) actually did read the brochure page—and no evidence of an effect on employees, as the majority demanded in the recent *Delta Brands* decision, refusing to set aside an election based on an unlawful no-solicitation rule in an employer policy manual.[4] Gallo himself apparently regarded the policy (i.e., what he purported to believe the policy was) as reflecting negatively on the Union. It is possible that the Employer shared this view, which might explain why it disseminated the brochure. And other employees presumably inferred that the Employer, which opposed unionization, was disseminating the Union's supposed fee-waiver policy to persuade employees to vote *against* the Union.

Under these unusual circumstances, then, setting aside the election unfairly punishes the Union and the emloyees who supported it for conduct over which they had no control. Accordingly, I dissent.

Dated, Washington, D.C. May 25, 2006

Wilma B. Liebman, Member

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the plant would close. The threat was disseminated by the union. The employer was aware of the dissemination, but "made no effort to inform its employees that [the threat] . . . did not represent its policy." 284 NLRB at 272. Here, there is no evidence that the Union was aware of the Employer's distribution of the ambiguous brochure. Its actual fee-waiver policy was lawful, and it did communicate that policy to employees generally.

[4] *Delta Brands, Inc.*, 344 NLRB No. 10 (2005). There, over my dissent, the majority departed from the Board's traditional approach of setting aside an election based on an employer's mere maintenance of an unlawful rule. See, e.g., *Freund Baking Co.*, 336 NLRB 847 (2001). The employer required employees to abide by the employee handbook. New employees were required to sign the handbook. Three employees were hired and were given the handbook with 6 months of the election (one dudring the critical period). The election was decided by two votes. Nevertheless, the *Delta Brands* majority cited the lack of "evidence that the Employer enforced the rule or that any employee was in fact deterred by the rule from engaging in Section 7 activity." 344 NLRB No. 10, slip op. at 2. The majority insisted that I had "presume[d] that employees are 'affected' by the rule," because there is no evidence of such an effect." Id. It noted that the "burden is on the objecting party to prove its objection, and without such a presumption, that burden is not satisfied here." Id. (footnote omitted).

I see no way to reconcile the approach taken in *Delta Brands* with the approach taken by the majority here. In this case, there is no evidence that the Union actually maintained an unlawful fee-waiver policy—just the opposite. Nor is there any evidence that a sufficient number of employees (1) believed that the Union had an unlawful policy and (2) therefore voted in favor of the Union. The majority simply presumes these things.